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Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 449 **449**

BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION LOCAL 262, SAM NANCE, WILLIAM MORGANSON, CHARLEY MEYER AND E. W. HOLBROOK,

Petitioners,

vs.

W. L. GAZZAM,

Respondent.

PETITION FOR REHEARING.

DANIEL D. CARMELL,
318 W. Randolph Street, Chicago, Illinois.

Supreme Court of the United States

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Now come the Building Service Employees International Union Local 262, Sam Nance, William Morganson, Charley Meyer and E. W. Holbrook, by and through Daniel D. Carmell, their attorney, and present herewith their petition for rehearing of the above-entitled cause and respectfully pray that a rehearing be granted in said cause upon the grounds and for the reasons hereinafter set forth in the petition herewith presented.

MAY IT PLEASE THE COURT:

It is with a sickening feeling in the writer's heart that this petition for rehearing is prepared. To think that

in the year 1950, the Supreme Court of the United States will label the efforts of a handful of local union people, who are employed as maids, charwomen and cleaners, "coercing an employer" if they try to have the largest employer in their field raise his wages so that their own livelihood would not be periled.

Much is made by this Court of the mocking gesture of the employer who ordered his housekeeper—the supervisor of his employees—to take a vote of the employees in her presence after a speech by the union representative. The intimidation of employees when taking such a vote under the watchful eye of the supervisor is an all-too-well known fact warranting no further belaboring. Surely such a vote cannot be regarded as the workers' free and uninfluenced choice.

The union did not coerce the employer. It wanted to bargain with the employer. Repeatedly it made concessions and new proposals for an agreement and was encouraged to do so by the skilled lawyer of the employer. Yet, whenever a new proposal was made by the union, what was the stereotyped answer of the employer? "No." Then at a point where he decided it will do him most good, he goes to court, charges that he was coerced and asks for an injunction. Such type of procedure permits an employer to effectively prevent the organization of his workers and to thwart the process of collective bargaining; it permits him to impose his terms upon the union by relieving him from his duty to make any counter-offers to the union's proposals. If counter-offers were made, the union had an opportunity to accept or reject them. But this Court says that if the employer deliberately fails to answer a union's proposal for an agreement and flouts the process of collective bargaining and does nothing, the union in turn must do an illegal act, since it attempts

to coerce the employer into something which he does not wish to do. Thus this Court aids the machinations of a skilled lawyer when he deals with the representative of 56 maids and charwomen—the exact number of the local's membership—the union representative himself being a member of the craft. This Court says that the poor union fellow must be as smart as the skilled lawyer.

Then, we have the spectacle of using the preamble to an *anti-injunction* act as the basis for granting an *injunction*. Moreover, this preamble is identical with that of the Norris-La Guardia Act and the interpretation which was given to it in the instant case was rejected unanimously by all other courts, including this Court.

This Court further lays down, for the first time, the rule that when a union does not represent the majority of employees, it cannot ask for the right to bargain for them. Again this Court accepts a view, rejected by all other courts, that the mere assertion of a right is equivalent to the establishment of the right. The entire reasoning of this Court would be correct only, if the Washington Labor Disputes Act—which it does not—would provide like the National Labor Relations Act and other similar statutes for an orderly process of collective bargaining, appropriate bargaining units, an adequate hearing, certification of collective bargaining representatives and a duty to bargain in good faith. In the absence of such provisions to speak of "coercion of an employer" by the union, if the union asserts collective bargaining rights on behalf of the employees, seems to be highly incongruous, especially where the employer is allowed at the same time to shirk every obligation to bargain with the union and simply to ignore each and every proposal made by the union.

I.

The State Supreme Court's finding of coercion was based solely upon the absence of a direct employer-employee relationship.

This Court's decision is based upon the narrow point that the peaceful picketing was carried on in the instant case for the purpose of compelling the employer to coerce his employees' choice of bargaining representative, that such coercion was unlawful under the law of the State of Washington and that the picketing, therefore, was carried on for an unlawful purpose. In making this determination, however, this Court failed to go one step further and to examine the underlying and decisive reason upon which the State Supreme Court based its determination of coercion. A reading of the State Supreme Court's opinion, which alone can form the basis of this Court's decision, conclusively reveals that the State Court grounded its findings of coercion solely upon the absence of a direct employer-employee relationship. Thus, in reviewing all its previous decisions concerning labor controversies, the State Supreme Court stressed in its opinion with respect to each and every decision reviewed only one factor—the existence or the absence, respectively, of a direct employer-employee relationship. The following few excerpts of the State Court's opinion (Rec. 16-21) will make this point crystal-clear:

> "The facts in the *Safeway Stores, Inc.*, v. *Retail Clerks' Union, Local No. 148,* 184 Wash. 322, 51 P. 2d 372, decided in 1935, indicate that in order to get the employees of the Safeway stores to join the retail clerks' union, the latter marched pickets to and fro in front of the stores. * * * It was also held that the 1933 *labor disputes act was inapplicable to non-employee picketers.* * * *
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> "In *Blanchard* v. *Golden Age Brewing Co.*, 188 Wash. 396, 63 P. 2d 397, decided by this court in 1936,

the 1933 act was interpreted, and three sections (7, 8 and 9) were held unconstitutional. • • • *It will be noted that in this case a 'labor dispute' within the meaning of the act was found to exist because employees of the defendant were involved.* • • •

• • •

"In *Adams* v. *Building Service Employees International Union, Local No. 6,* 1938, 197 Wash. 242, 84 P. 2d 1021, this court again had before it a case in which the evidence showed that *an outside union* was seeking to organize the workers in the plaintiff's place of business, using pickets to lend strength to the battle. • • •

"The *Safeway* case was again the basis of a decision holding that picketing done by *an outside union* was unlawful, in *Fornili* v. *Auto Mechanics' Union Local No. 297, etc.,* 1939, 200 Wash. 283, 93 P. 2d 422.

"The next case is that of *United Union Brewing Co.* v. *Beck,* 1939, 200 Wash. 474, 93 P. 772, which involved the activities of *an outside union,* and included picketing. • • •

• • •

"*O'Neil* v. *Building Service Employees International Union, Local No. 6,* 1941, 9 Wash. 2d 507, 115 P. 2d 662, 137 A.L.R. 1102, is the next case which has to do with picketing. • • • The *employer-employee relationship did not exist between the disputants.* • • •

• • •

"In *Swenson* v. *Seattle Central Labor Council, supra,* the facts were: The employer employed non-union labor. • • • Passing upon the question, identical with the one presented here, we stated [177 P. 2d 877]: 'There could not have been a dispute "between one or more employers or associations of employers and one or more employees or associations of employees," as provided in the act, because here, *no members of the picketing unions were employees of the Sweden manufacturing company. A jurisdictional dispute between rival unions can become a*

> *"labor dispute" provided the union members involved are employees of the same company,* and provided further that no exclusive bargaining agency has been set up or provided for. Here, there was no labor dispute.'" (Emphasis supplied.)

If the existence or the absence of a direct employer-employee relationship had no bearing upon the case, as this Court seems to believe, why this constant emphasis of the State Supreme Court upon that point?

The fact that the absence of a direct employer-employee relationship was the pivotal point of the State Court's decision is corroborated and confirmed by the express overruling of the cases of *O'Neil* v. *Building Service Employees International Union, Local No. 6,* 9 Wash. 2d 507, 115 P. 2d 662, 137 A.L.R. 1102 (1941) and *S and W Fine Foods, Inc.* v. *Retail Delivery Drivers and Salesmen's Union, Local No. 353,* 11 Wash. 2d 262, 118 P. 2d 962 (1941). These cases dealt with the question of the legality of peaceful picketing *viewed exclusively from the aspect of the absence of a direct employer-employee relationship,* and declared picketing lawful where the pickets were not employees of the picketed employer. Here again the same question as previously posed, arises: If coercion of the employer to compel his employees' choice of representative was the sole issue, independent from and unconnected with the existence or the absence of a direct employer-employee relationship, why was it necessary for the State Court to expressly overrule two previous decisions which were based exclusively upon the legality of picketing in cases where a direct employer-employee relationship was absent and, therefore, had supposedly no bearing upon the present case? The answer is, of course, obvious: *the State Court considered the picketing coercive only because of the absence of a direct employer-employee relationship.* Yet, since this is the basis of the

State Court's decision, the present case is squarely in point with *American Federation of Labor* v. *Swing*, 312 U. S. 321, 61 S. Ct. 568, 85 L. Ed. 855 (1941). It is, therefore, respectfully pointed out that it is not quite understandable how this Court can declare that the State of Washington "has not here, as in Swing, relied on the absence of an employer-employee relationship." This is the very thing upon which the State Court relied. It is patent upon the face of the State Court's opinion; it relied upon it in all its previous decisions where there was no direct employer-employee relationship present, and reached in them the same result as in the instant case, with the exception of the *O'Neil* and *S and W Fine Food* cases, which were promptly overruled. For these reasons, the same result should be reached by this Court in the present case as was reached in the *Swing* case, and the State Court's decision reversed.

In this connection it should be stressed that the State Court's opinion, which alone is under attack in the present case, prohibits by its wording each and every type of picketing and establishes the union's liability for damages for picketing of *whatever kind and nature*. It does not contain any subtle *theoretical and meaningless* distinctions and artificial refinements distinguishing between "picketing per se" or "picketing directed at employees for organization purposes" and picketing for the purpose of violating the policy of the State of Washington. The injunction decree which is phrased in such a way as to restrain the union from endeavoring to compel the employer to coerce his employees to join the union was issued by the trial court and not by the State Supreme Court. But it is the State Supreme Court's opinion, which, as just mentioned, is broad enough to prohibit any type of picketing in the absence of an employer-employee re-

lationship, that is under attack in the present case—and not the trial court's injunction decree; this is contrary to the *Swing* case, where the injunction decree of the Illinois Appellate Court was at issue and not the opinion of the Illinois Supreme Court.

Keeping these considerations in mind, it is respectfully reiterated that this Court reconsider its opinion.

II.

The State Court prohibited the exercise of rights guaranteed by the Federal Constitution.

This Court states in its opinion "that picketing is in part an exercise of the right of free speech guaranteed by the Federal Constitution," citing the *Angelos*, *Wohl*, *Swing*, *Carlson*, *Thornhill*, and *Senn* cases. Although none of the cases cited, with the exception of the concurring opinion of Mr. Justice Douglas in the *Wohl* case, contains such a qualification as is expressed in the just cited statement, one feature remains outstanding—the fact that picketing involves the right of freedom of speech, and that peaceful picketing is a means of communicating thoughts, ideas, grievances,—"the workingman's means of communication". (*Milk Wagon Drivers Union of Chicago, Local 753* v. *Meadowmoor Dairies*, 312 U. S. 287, 293, 61 S. Ct. 552, 85 L. Ed. 836, 132 A.L.R. 1200). The question then arises: May picketing, insofar as it is a means of communication, be used by workers, free from any interference by a state, to convey grievances to the public concerning conditions in which the workers as well as the public have a vital and legitimate interest? The answer to this question must be in the affirmative; for, insofar as picketing is a means of communication, it must receive the same constitutional protection as other

means of communication receive, such as newspaper articles, radio-broadcasts, pamphlets and so forth. Yet, could it be seriously contended that the right of freedom of speech would not have protected a newspaper article published by the union, which contained the very same grievances against the employer as those printed on the picket signs? Would that have been considered coercion? Obviously, that part of picketing which is communication may not be suppressed. No such distinction was made in the instant case by the State Court.

It cannot be doubted that workers, like any other citizens have the right to inform the community of the facts of a labor dispute. However, in the present case, the union and its members were effectively shut off by the State Court from doing so, under the guise that such communication was intended to coerce the employer; or in other words, was intended to inflict damage upon the employer, if he would not give in to the union's demands. But it is a recognized principle that workers and employers compete with each other over the share and division between them of the joint product of capital and labor (see Chief Justice Taft's statement in *American Steel Foundries* v. *Tri-City Central Trades Council*, 257 U. S. 184, 209; and Justice Brandeis' words in *Senn* v. *Tile Layers Protective Union*, 301 U. S. 468), and that such competition justifies "the intentional inflicting of temporal damage, including the damage of interference with a man's business by some means, when the damage is done, not for its own sake, but as an instrumentality in reaching the end of victory in the battle of trade." (Justice Holmes in his dissenting opinion in *Vegelahn* v. *Guntner*, 167 Mass. 92, 106, 44 N. E. 1077, 1081 (1896)): The fact that such damage might result to the employer and the further fact that the pressure of publicity might

influence an employer to yield to the union's demands is not such an evil that it justifies suppression of free speech. The decision of the State Supreme Court of Washington suppresses free speech; it takes away the right from workers to request the public not to patronize a business which employs men whose lower wages and inferior working conditions tend to undermine the higher wage and living standards of union workers.

Contrary to its previous rulings, this Court upholds the State Court in its suppression of free speech. It accepts the findings of coercion by the State Court without any question and does not examine whether a constitutional right is thereby infringed upon or not. Thus, it departs from its previous holdings in cases involving similar factual situations. In the *Swing* (312 U. S. 321), *Wohl* (315 U. S. 769), and *Angelos* (320 U. S. 293) cases the state courts declared the picketing employed by the unions coercive and unlawful, yet this Court persistently refused to accept those findings and stressed that it would not permit the state courts to use such findings as a device to interfere with rights guaranteed by the United States Constitution. Thus the New York State Court found in the *Wohl* case, as quoted by this Court in that decision, "that the respondents 'are the sole persons required to run their business and therefore they are not subject to picketing by a union or by the Defendants *who seek to compel them to employ union labor.*' ". (Emphasis supplied). This Court, however, determined that such finding of coercion could not be used by the state court as a means to outlaw peaceful picketing, and thereby to inhibit the right of freedom of speech, and reversed the state court's decision. The same is true with respect to the *Angelos case*. There, too, the New York court attempted to outlaw picketing by finding that the picketing

was unlawful under the state statutes. This Court pointed to the fallacy of this theory and said (88 L. ed. 60):

> "The Court here, as in the *Swing* case, was probably led into error by assuming that if a controversy does not come within the scope of state legislation limiting the issue of injunctions, efforts to make known one side of an industrial controversy by peaceful means may be enjoined. But, as we have heretofore decided, a state cannot exclude working men in a particular industry from putting their case to the public in a peaceful way 'by drawing the circle of economic competition between employers and workers so small as to contain only an employer and those directly employed by him.' *American Federation of Labor* v. *Swing*, 312 U. S. at 326, 85 L. ed. 857, 61 S. Ct. 568."

This Court declares in its opinion that the right of freedom of speech is not infringed upon by the State Court, that picketing *per se* or picketing directed at employees for organizational purposes is not prohibited under the injunction decree of the trial court and that this Court cannot agree with petitioners' reading of the injunction that "whatever types of picketing were to be carried out by the union would be in violation of the decree." It is respectfully pointed out that this statement of the Court deals only with part of the petitioners' contention. As stated by them in their Reply Brief (p. 16) an analysis of the trial court's decree will reveal not only that every type of picketing is banned by the decree, but also that *every other kind of peaceful communication* is prohibited. This appears clearly from the very wording of the decree which forbids the union "from endeavoring to compel plaintiff to coerce his employees to join the defendant union * * * by picketing the hotel premises of plaintiff, * * * in any manner whatsoever, whether *di-*

rectly or indirectly, and by urging and persuading others to withhold their patronage from the plaintiff • • •" (Emphasis supplied.) (Rec. 39). A more effective ban of free communication can hardly be visualized. It should once more be emphasized that not only picketing was banned but any other type of communication; the employer can always say under the decree in question that, for instance, a radio broadcast which would point out to union members the fact that non-union employees work in the Emetai-Inn, might have the effect to urge persons to withhold their patronage from his place of business, and, thereby, might *indirectly* compel him to force his men to join the union or to choose the union as bargaining representative.

This Court devotes in its opinion its entire attention to the problem of picketing, basing its determination upon the peculiarities of picketing as a means of communication. But it fails to consider the broad impact of the State Court's opinion and the trial court's decree which include within their proscription all means of communication used by a union and do not restrict themselves to picketing alone. If that fact is taken into consideration, coupled with a recognition of the broad import of the decree upon all types of communication, it seems to the petitioners that a different result must be reached by this Court, since the effect of the State Court's infringement upon the right of freedom of speech is as broad and all-inclusive as that of the Illinois Court in the *Swing* case.

This Court relies in its opinion upon the case of *Giboney* v. *Empire Storage Co.*, 336 U. S. 490. It is respectfully contended that the latter case differs materially and widely from the present one and that the decision rendered in that case should not be considered as one controlling the present situation. The union did not here use

its economic power to compel the employer to abide by union policy rather than by the declared policy of the state. It merely attempted to advertise the fact that here was a business which was inimical to the best interests of labor. A state is not free at its whim, will and pleasure to declare conduct unlawful. It can do so only if it does not thereby infringe upon constitutionally guaranteed rights. Were it otherwise, a state could by that simple device defeat the constitutional rights of every citizen. Yet, this was done by the State Supreme Court of Washington when it suddenly declared conduct unlawful, which had been up to that time lawful, and thereby effectively prevented union men from communicating their grievances to the public; not only by means of picketing but by any other means as well.

Respectfully submitted,

DANIEL D. CARMELL.

I hereby certify that this petition for rehearing is presented in good faith and not for delay.

DANIEL D. CARMELL,
Attorney for Petitioners.